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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 DONALD C. HAYES,

9 Plaintiff,

v.

10 STATE OF WASHINGTON,
11 DEPARTMENT OF CORRECTIONS,
et al.,

12 Defendants.
13

CASE NO. C16-5095 BHS-DWC

ORDER ADOPTING REPORT
AND RECOMMENDATION

14 This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable David W. Christel, United States Magistrate Judge, and Plaintiff’s
15 objections to the R&R. The R&R was filed on January 19, 2018, and Plaintiff filed his
16 objections on February 1, 2018. Dkts. 269, 272. The factual and procedural background
17 of this case are set forth in more detail in the R&R. Dkt. 269 at 2–3.
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19 The district judge must determine de novo any part of the magistrate judge’s
20 disposition that has been properly objected to. The district judge may accept, reject, or
21 modify the recommended disposition; receive further evidence; or return the matter to the
22 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

1 The R&R properly concludes that Plaintiff's claims against Defendant Suiter are
2 barred by the statute of limitations. Even if they were not, the record shows that Suiter
3 actually addressed Plaintiff's medical needs with adequate care to the extent she was
4 made aware of them, and did not treat those needs with deliberate indifference. *See*
5 *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004). Furthermore, Plaintiff cannot
6 sustain Fourteenth Amendment informed consent claims on the vague and general
7 assertions that he consented to medical treatment from Suiter but not treatment that
8 would be inadequate. Plaintiff's claims against Suiter are dismissed.

9 The R&R properly concludes that Plaintiff has failed to state a claim against
10 Defendant Smith in regards to allegations that Smith (1) failed to provide him with
11 treatment by a community specialist until a month after Plaintiff thought appropriate, (2)
12 failed to schedule Plaintiff for a follow-up meeting with a community surgeon, (3) failed
13 to provide consistent treatment, or (4) failed to adequately address Plaintiff's declaration
14 of a medical emergency. Plaintiff makes numerous conclusory allegations in support of
15 these claims but fails to allege facts suggesting personal participation by Smith in any
16 denial of the type of medical attention for which Smith was responsible to provide
17 Plaintiff. The R&R also properly concludes that Smith is entitled to summary judgment
18 on Plaintiff's remaining claims for inadequate treatment of pain. The record demonstrates
19 that Plaintiff regularly received medication and care for his complaints of pain and
20 Plaintiff has failed to present evidence of any incident whereupon Smith was informed of
21 his pain and failed to respond appropriately.
22

1 The R&R correctly determines that Defendant Reyes is entitled to summary
2 judgment on Plaintiff's claims that Reyes wrongfully denied Plaintiff access to medical
3 care on July 30, 2015. The record shows that Plaintiff received a bandage change on July
4 29, 2015, and refused another bandage change on July 31, 2015. Plaintiff was seen only
5 three days later, on August 3, 2015, for a wound cleanse and additional bandage change.
6 Plaintiff's medical records note that his wounds were closing well during this period.
7 Accordingly, the record refutes Plaintiff's claims that Reyes denied him access to a
8 necessary bandage change in deliberate indifference to a serious medical need during that
9 timeframe.

10 The R&R correctly concludes that Defendant Duong is entitled to summary
11 judgment. The record shows that Duong ordered a wound culture for Plaintiff on March
12 31, 2016. After Duong received the results of the culture on April 5, 2016, Duong
13 ordered an antibiotic medication for Plaintiff that same day. Performing a physical
14 examination of Plaintiff on April 25, 2016, Duong determined that Plaintiff was not
15 suffering from a serious or life threatening condition, even though Plaintiff had not yet
16 been provided the antibiotics Duong had prescribed. Accordingly, Plaintiff has failed to
17 show any acts by Duong that prevented him from obtaining adequate medical care in
18 deliberate indifference to a serious medical need.

19 The R&R correctly concludes that the Washington State Department of
20 Corrections (DOC) is entitled to summary judgment on Plaintiff's claims under the
21 Americans with Disabilities Act. Plaintiff alleges that because of his hospitalization for
22 chronic wounds and the use of opiates during his treatment, as well as the DOC's refusal

1 to enroll him in rehabilitation programs after being released from prison, Plaintiff was
2 precluded from participating in the Drug Offender Sentencing Alternative (“DOSA”)
3 program. Plaintiff’s claim is that the DOC is responsible for this exclusion from the
4 DOSA program because it failed to provide him with the treatment to overcome his drug
5 addiction and maintain sobriety. But Plaintiff has failed to show that he was qualified to
6 participate in DOSA. While it is unfortunate that Plaintiff’s treatment for his chronic
7 wounds contributed to his relapse and that the DOC was unable to accommodate his
8 request for rehabilitation programs after his release, Plaintiff has failed to show that he
9 was entitled to different treatment from the DOC for his chronic wounds. Further, he
10 cannot blame his drug addiction that predated his incarceration or his post-release relapse
11 on the DOC.

12 Plaintiff also generally argues that Judge Christel failed to properly screen
13 Plaintiff’s fourth amended complaint and should have addressed any shortcomings in the
14 complaint during such screening rather than in response to a motion for summary
15 judgment. *See* Dkt. 272 at 2–4, 6. This is not a proper objection to the R&R, as it does not
16 raise any concerns over the R&R’s conclusions that numerous claims raised by Plaintiff
17 are not adequately pled or are disproven by the record. Plaintiff also assigns error to the
18 R&R by claiming that it held Plaintiff to a heightened pleading standard. *See* Dkt. 272 at
19 2–4, 28–29. However, the R&R correctly determined that Plaintiff’s claims need only
20 contain sufficient factual detail as to “give the defendant fair notice of what the . . . claim
21 is and the grounds upon which it rests.” *Erickson v. Pardus, et al.*, 551 U.S. 89, 93 (2007)
22 (internal citations omitted). To the extent that the R&R recommends the dismissal of

1 certain claims on the basis that they were inadequately pled,¹ the R&R appropriately
2 applied this standard and determined that the complaint failed to allege facts that would
3 support all the necessary elements of the relative claims.

4 Finally, while Plaintiff complains that he was denied discovery, Plaintiff has failed
5 to provide any evidence or substantive discussion to establish that the Defendants
6 neglected any particular discovery obligations. Moreover, Plaintiff has failed to show
7 how the unspecified evidence he seeks would enable him to withstand Defendants'
8 summary judgment motions if the Court were to grant a continuance pursuant to Fed. R.
9 Civ. P. 56(d).

10 The Court having considered the R&R, Plaintiff's objections, and the remaining
11 record, does hereby find and order as follows:

12 (1) The R&R is **ADOPTED**; and

13 (2) This action is **DISMISSED**.

14 The Clerk shall enter a JUDGMENT and close the case.

15 Dated this 28th day of February, 2018.

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BENJAMIN H. SETTLE
United States District Judge

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¹ It should be noted that with the exception of certain claims against Smith, in the instances when
22 the R&R recommends the dismissal of claims for inadequate pleading it alternatively recommends the
entry of summary judgment in favor of Defendants based on the record.